No. 85-1308

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK GERACE and FRANK MATERIO,

Petitioners,

v.

STATE OF NEW JERSEY, CASINO CONTROL COMMISSION AND STATE OF NEW JERSEY, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether a State violates the First Amendment by disqualifying and removing from office two officials of a casino-industry labor organization found to have operated their union under the influence of organized crime.

2. Whether a state statute which provides for the disqualification and exclusion from the casino industry of persons who associate with organized crime in a manner inimical to gaming policy is vague on its face or as applied to two casino union leaders found to have operated their union under the influence of organized crime.

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RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the Superior Court of New Jersey, Appellate Division, is reported. *In re Hotel and Restaurant Employees and Bartenders International Union Local 54*, 203 N.J. Super. 297, 496 A. 2d 1111 (App. Div. 1985).

Two additional decisions exist in related proceedings which are not referred to by the Petitioners. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Read*, 597 F. Supp. 1431 (D.N.J. 1984), is a decision of the District Court subsequent to this Court's remand in *Brown* v. *Hotel and Restaurant Employees and Bartenders International Union Local 54*, 104 S.Ct. 3179 (1984). The District Court's decision was affirmed without opinion by the United States Court of Appeals for the Third Circuit. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Read*, 772 F. 2d 895 (3d Cir. 1985) (mem.).

Statement of the Case

In *Brown, supra*, 104 S.Ct. at 3182-3185, this Court vindicated the right of the State of New Jersey to police its casino gaming industry by upholding, against a preemption challenge, the application to the Petitioners of the disqualification criteria of N.J. Stat. Ann. §5:12-86(f) (Supp. 1985-1986), as part of a comprehensive statutory scheme "designed to extend strict State regulation to all persons . . . related to the operation of licensed casino enterprises," §5:12-1(b)(6), toward the end of "insur[ing], so far as practicable, the exclusion from participation [in gaming] of persons with known criminal records,

habits or associations," §5:12-1(b)(7). The Court's decision was based upon the State's compelling interest in protecting its nascent casino industry against the infiltration of organized crime, particularly through the avenues provided by labor racketeering and related corruption. 104 S.Ct. at 3182-3184, 3190. Different grounds are now urged to invalidate the application of Section 86(f) to the Petitioners.

By way of background, Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"), is an unincorporated labor organization which represents 8,000 casino hotel employees. Petitioner Frank Gerace was the union's president, and Petitioner Frank Materio was a grievance manager. In 1978, Local 54 and its officials began filing with the Casino Control Commission ("Commission") the annual registration statement required by Section 93(a) of the Act. Pursuant to Sections 76 and 94(a), the Division of Gaming Enforcement ("Division") thereafter conducted an investigation of Local 54 and its officials and reported to the Commission that, in its view, Gerace and Materio were disqualified under the criteria of Section 86. See 104 S.Ct. at 3184.

Following a hearing in 1982, the Commission issued an opinion holding Gerace and Materio disqualified under §5:12-86(f), which bars those adjudicated to be "an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of [the Casino Control Act] and to gaming operations." The basis for this decision was the Commission's finding that the Petitioners had operated Local 54 under the influence of Nicodemo Scarfo, a notorious career criminal and reign-

ing head of the organized crime "family" dominant in the Philadelphia-Atlantic City region. Pet. 122a-130a, 199a-206a. More specifically, the Commission found that the Petitioners had maintained a knowing, purposeful, long-standing and continuing association with Scarfo; that the Petitioners had contributed cash and property to a bail fund used to secure the release of Scarfo and his codefendants following their arrest for a widely-publicized homicide; that the Petitioners had actively participated in the appointment of persons allied with Scarfo to positions of authority within Local 54; and that the Petitioners consistently funneled union business to persons or firms connected to Scarfo. Pet. 133a-180a, 202a-206a.

On an appeal from the Commission's decision, the New Jersey Superior Court, Appellate Division, thoroughly canvassed the record supporting the agency's disqualification of Gerace and Materio, and concluded:

> [T]he Commission had a record replete with circumstantial evidence of Scarfo's influence over Gerace and Materio. The evidence manifests itself in the union officials' personal relationship with Scarfo as well as in their business relationships with Scarfo associates. The sheer number of ties to Scarfo renders incredible an innocent explanation. . . . Considering the record as a whole, we conclude that the findings of fact are supported by sufficient credible evidence. [*In re Local 54, supra,* 203 N.J. Super. at 321, 496 A. 2d at 1124; Pet. 38a-39a].

Disposing of the argument that the Petitioners' disqualification violated their freedom of association as embodied in the First Amendment, the court found the relationships

between Gerace, Materio and Scarfo to be quite dissimilar from the types of intimate human relationships previously held deserving of constitutional protection. 203 N.J. Super. at 321-326, 496 A. 2d at 1124-1126; Pet. 39a-51a. Solely in the alternative, the court ruled that any associational infringement resulting from the disqualification of Gerace and Materio was justified by the State's compelling interest in protecting its casino industry from the influence of organized crime. 203 N.J. Super. at 326-328, 496 A. 2d at 1126-1127; Pet. 51a-56a. From the decision of the Supreme Court of New Jersey denying certification and dismissing the Petitioners' appeal, Pet. 1a-2a, certiorari is presently sought.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The First Amendment question raised in the Petition is not presented by the record or the decision below. The only First Amendment question presented by the record is insubstantial, and was correctly decided below.

The First Amendment question raised and repeatedly argued in the Petition is whether a "social" relationship between the Petitioners and a high-ranking member of organized crime falls within the constitutionally protected "freedom of intimate association" discussed by this Court in *Roberts* v. *United States Jaycees*, 104 S. Ct. 3244, 3249-3251 (1984). The record in this case, however, discloses that Gerace and Materio were not disqualified for maintaining a social association with Scarfo, but for conducting the affairs of their union under the influence of Scarfo

and his organized crime interests. Pet. 199a-202a; *In re Local 54, supra,* 203 N.J. Super. at 321, 496 A. 2d at 1124; Pet. 38a-39a. Such criminal associations are a far cry from the type of intimate familial attachments deserving of the greatest constitutional protection and, on the spectrum of human relationships referred to in *Roberts,* more closely resemble the commercial contacts which merit little or no constitutional shelter. See 104 S.Ct. at 3249-3251. See also *Read, supra,* 597 F. Supp. at 1446-1448; *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317, 336 (D.N.J. 1982), *rev'd,* 709 F. 2d 815 (3d Cir. 1983), *vacated,* 104 S.Ct. 3179 (1984). Although the Petitioners seemingly seek to have this Court relitigate the validity of the Commission's finding of influence,* Pet. 5-16, the Court does not grant certiorari to review evidence and discuss specific facts, *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). In effect, neither the record nor the decision below will support a determination of the First Amendment question raised in the Petition.

The only issue which is presented by this record, whether the Petitioners' operation of Local 54 under the influence of organized crime would properly disqualify them from participation in New Jersey's casino industry, was actually conceded by the Petitioners below. *In re Local 54,* 203 N.J.

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* In so doing, the Petitioners continue to rely upon evidence which is outside the record of this proceeding, in flagrant disregard of this Court's procedures. See Pet. 7,8 (referring to testimony of a state police officer); Pet. 9 (detailing the results of an alleged polygraph examination taken by one of the Petitioners after the conclusion of the Commission hearing). See *In re Local 54, supra,* 203 N.J. Super. at 320n.5, 496 A. 2d at 1123n.5; Pet. 37an.5.

Super. at 317, 496 A. 2d at 1122; Pet. 29a-30a. That concession is consistent with the prevailing authority, which is unanimous in affirming that associations which negatively affect an individual's job performance or fitness to participate in a highly-regulated industry may constitutionally form the basis for exclusionary action by the State. *See, e.g., Wilson* v. *Taylor,* 733 F. 2d 1539, 1544n.3 (11th Cir. 1984) (refusing to hold that law enforcement officer could never be fired because of associations with certain felons, indicted individuals, suspects or their relatives); *Lewitus* v. *Colwell,* 479 F. Supp. 439, 444-445 (D. Md. 1979) (upholding denial of horse racing owner's license based upon applicant's association with individual involved in previous racing violations); *Fisher* v. *Snyder,* 346 F. Supp. 396, 401 (D. Neb. 1972), *aff'd,* 476 F. 2d 375 (8th Cir. 1973) (acknowledging that associational conduct which interfered with teacher's work could properly be made subject of discipline by State); *Durham* v. *Louisiana State Racing Com'n.,* 458 So. 2d 1292, 1294-1295 (La. 1985) (upholding suspension of wife's horseracing licenses based on husband's disqualification and financial interdependence of spouses); *Spilotro* v. *State,* 99 Nev. 187, 661 P. 2d 467, 470-471 (1983) (holding that individual may be excluded from casinos based upon criminal associations); *Morrisette* v. *Dilworth,* 59 N.Y. 2d 449, 451-453, 452 N.E. 2d 1222, 1223-1224, 465 N.Y.S. 2d 894, 895-896 (1983) (affirming validity of police department regulation prohibiting association or fraternization with known felons).

This Court itself has had prior occasion to consider questions analogous to those presented herein. In *In re Application of Boardwalk Regency Corp. for a Casino License,* 90 N.J. 361, 447 A. 2d 1335 (1982), *aff'g* 180 N.J.

Super. 324, 434 A. 2d 1111 (App. Div. 1981), the courts of New Jersey upheld a decision excluding two individuals from the casino industry based upon their associations with a reputed organized crime figure and the impact of such associations on the policies intended to be served by gaming regulation. The disqualified individuals subsequently took an appeal to this Court, arguing that they could not constitutionally be penalized for lawful and proper business transactions and that such a result represented an impermissible finding of guilt by association. *Perlman* v. *Attorney General,* Docket No. 82-691, Jurisdictional Statement at i-ii, 3-10. After the filing of responding and reply briefs, the appeal was dismissed by this Court "for want of a substantial federal question." *Perlman* v. *Attorney General,* 459 U.S. 1081 (1982).

Most recently, this Court denied certiorari in *Baron* v. *Meloni,* 106 S.Ct. 798 (1986). As disclosed by the opinions below, the courts therein upheld, over a First Amendment challenge, the dismissal of a deputy sheriff for carrying on an association with the wife of a reputed organized crime member, the courts recognizing the State's concern with preventing the fact or appearance of corruption within its police force. *Baron* v. *Meloni,* 556 F. Supp. 796 (W.D.N.Y.), *remanded mem.,* 742 F. 2d 1439 (2d Cir. 1983), *on remand,* 602 F. Supp. 614 (W.D.N.Y.), *aff'd mem.,* 779 F. 2d 36 (2d Cir. 1985), *cert. denied,* 106 S.Ct. 798 (1986).

In the present matter, this Court has already recognized that New Jersey has a compelling interest in protecting its casino industry from organized criminal infiltration, corruption and racketeering, through the labor organizations and officials involved in gaming. *Brown, supra,* 104

S.Ct. at 3182-3184, 3190. That interest clearly warrants and justifies the disqualification and removal from office in a casino industry union of officials found to have operated that union under the influence of organized crime. The Petitioners' suggestion that the State could not constitutionally act against them until they had committed some specific act of misconduct, Pet. 37-40, fails to recognize that the purpose of the Casino Control Act—like so many other licensing and regulatory standards in sensitive fields—is prophylactic, designed to *prevent* corruption, not merely to react to illicit activity after the damage has been done. See *Trade Waste Mgt. Assn., Inc.* v. *Hughey*, 780 F. 2d 221, 239 (3d Cir. 1985) (State has compelling interest in preventing *risk* of organized criminal infiltration of sensitive industry). There is no foundation, in the First Amendment or elsewhere, for the illogical theory that persons involved in the casino industry are entitled to commit one free crime before the State may take exclusionary action.

In this connection, the fact that the Petitioners are *union officials* is legally irrelevant to the analysis or outcome herein. In *Brown, supra,* this Court acknowledged that the disqualification standards of Section 86(f) could be applied to leaders of casino labor organizations to the same extent as those standards are applied to all other casino industry applicants, licensees and registrants. 104 S.Ct. at 3183-3184, 3190. Inasmuch as this Court has already ruled that criminal associations may constitutionally disqualify casino license applicants from the gaming industry, *Perlman* v. *Attorney General, supra,* and because union officials' First Amendment rights of association are obviously no greater than any other individual's, the Peti-

tioners' claims are no more substantial than those previously rejected. The Petitioners patently lack standing to assert any rights on behalf of their union or its members, see Pet. 22, 39-40. Since, unlike the Petitioners, Local 54 itself chose to litigate its federal claims in federal rather than state court, see *Read, supra,* 597 F. Supp. at 1445, 1454, neither the Petitioners nor the union should be heard to advance the union's interests on review of the state court's decision.

2. The argument that N.J. Stat. Ann. §5:12-86(f) is vague on its face or as applied to the Petitioners is insubstantial and does not merit this Court's review.

At the outset, the Respondent questions whether the Petitioners' mere assertion, without more, that the New Jersey courts erred in rejecting their vagueness challenge, Pet. 40-55, is sufficient in itself to justify this Court's review. In *Perlman* v. *Attorney General, supra,* 459 U.S. at 1081, the Court dismissed the appeal of two casino license applicants, disqualified because of their organized crime associations, who argued that the Casino Control Act's requirement of good character was vague as applied to them. See *Perlman* v. *Attorney General,* Docket No. 82-91, Jurisdictional Statement at ii, 10-11. Obviously, if this Court were required to determine for itself whether every section of the Casino Control Act or every other licensing statute in America was vague on its face or as applied to every individual applicant rejected thereunder, little time would remain for other matters.

On the merits, the judgment below is completely in accord with the governing decisions of this Court. N.J.

Stat. Ann. §5:12-86(f) (Supp. 1985-1986), under which the Petitioners were disqualified, is a non-criminal economic regulation designed not to punish offenders, but to protect New Jersey's casino industry. *Brown, supra,* 104 S.Ct. at 3182-3184, 3190; *In re Local 54, supra,* 203 N.J. Super. at 329, 348-349, 496 A. 2d at 1128, 1138-1139; Pet. 58a-59a, 106a-107a. As such, and because the statute does not infringe on constitutionally protected interests, *Hotel and Restaurant Employees* v. *Danzinger, supra,* 536 F. Supp. at 335-336; *In re Local 54, supra,* 203 N.J. Super. at 329, 496 A. 2d at 1128; Pet. 59a, Section 86(f) is subject to the vagueness test set forth in *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982).

That test mandates that to succeed in a facial vagueness challenge to a statute, the complainant must demonstrate that the law is impermissibly vague in all of its applications. 455 U.S. at 497. Section 86 (f), however, as construed by the Commission in this and prior administrative decisions, clearly provides an objective standard which is sufficiently definite so as to be capable of some reasonable and valid application. See *In re Local 54, supra,* 203 N.J. Super. at 330-332, 496 A. 2d at 1128-1130; Pet. 59a-66a; *Danzinger, supra,* 536 F. Supp. at 336-338. The Petitioners' facial vagueness argument was thus correctly rejected below, and provides no basis for this Court's further review.

The Petitioners' assertions that Section 86(f) is vague as applied to them are no more compelling. That statute is a civil licensing provision which does not prohibit or render any conduct unlawful; it merely provides a standard

for assessing whether an individual has a disqualifying status, *i.e.* an association with organized crime inimical to gaming. Since that disqualifying status can exist without regard to the individual's foreknowlege, all of the Petitioners' "fair notice" arguments are legally irrelevant, see *Trade Waste, supra*, 780 F. 2d at 235, the only issue being whether the Commission's disqualification of Gerace and Materio represents an arbitrary application of the statute. The Petitioners' assertions fail on this score as well.

As noted earlier, the Petitioners were found to have operated their casino-industry labor union under the influence of organized crime. Such activity self-evidently constitutes *core conduct*, clearly within the legitimate sweep of Section 86 (f) and flagrantly inimical to state gaming and regulatory policy. Indeed, the Petitioners conceded as much below. *In re Local 54, supra*, 203 N.J. Super. at 317, 496 A. 2d at 1122; Pet. 30a. The familiar principle that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), is sufficient in itself to dispose of the Petitioners' claims.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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